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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13 David Watts and Whitney Keeter, on
14 behalf of themselves, and a class of
15 similarly situated persons,

16 Plaintiffs,

17 v.

18 VIZIO HOLDINGS, INC, a Delaware
19 Corporation, VIZIO, INC., a California
20 Corporation, VIZIO INSCAPE
21 SERVICES, LLC, a Delaware Limited
22 Liability Company, VIZIO INSCAPE
23 TECHNOLOGIES, LLC, a Delaware
24 Limited Liability Company, COGNITIVE
25 MEDIA NETWORKS, INC., a Delaware
26 Corporation, and DOES 1 – 50, inclusive,

27 Defendants.

Case No. 8:15-CV-01860-JLS

**FIRST AMENDED CLASS
ACTION COMPLAINT FOR:**

1. **Violations of the Video Privacy Protection Act, 18 U.S.C. § 2710**
2. **Violations of California's Consumer Records Act, Cal. Civ. Code § 2798.80**
3. **Violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.***
4. **Violation of the Consumer Legal Remedies Act Cal. Civ. Code §§ 1750, *et seq.***

DEMAND FOR JURY TRIAL

28 Plaintiffs David Watts and Whitney Keeter, by and through their attorneys,
upon personal knowledge as to themselves and their own acts and experiences, and
upon information and belief as to all other matters, complain and allege as follows:

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1 **I. JURISDICTION AND VENUE**

2 1. This Court has original jurisdiction over this action under 28 U.S.C. section
3 1332 (d) of The Class Action Fairness Act because the matter in controversy
4 exceeds the sum or value of \$5,000,000 exclusive of interest and costs and because
5 Plaintiffs and Defendants are residents of different states.

6 2. Venue is proper in this Court pursuant to 28 U.S.C. section 1391 because
7 Plaintiffs reside in and suffered injuries as a result of Defendants' acts in this
8 District; many of the acts and transactions giving rise to this action occurred in this
9 District, and Defendants (1) are authorized to conduct business in this District and
10 have intentionally availed themselves of the laws and markets of this District
11 through the manufacture, distribution and sale of their products in this District; and
12 (2) are subject to personal jurisdiction in this District.

13 **II. NATURE OF THE ACTION**

14 3. Vizio Holdings Inc. ("Vizio") was founded in California in 2002, and since
15 then has become a major marketer of electronics including Smart TVs, or Internet-
16 connectable televisions.

17 4. According to Vizio's S-1/A registration filing, filed with the Security and
18 Exchange Commission on October 22, 2015, their "products are sold in over 8,000
19 retail stores across the United States." The company held "the #2 unit share
20 position in the U.S. smart, high definition television, or HDTV, industry in 2014."

21 *See*

22 <http://www.sec.gov/Archives/edgar/data/1648158/000119312515350398/d946612d>
23 [s1a.htm](http://www.sec.gov/Archives/edgar/data/1648158/000119312515350398/d946612d)

24 5. Through its broad distribution of Smart TVs, the company states that it is
25 "creating a community of over 10 million VIZIO connected units, or VCUs. A
26 VCU is a Smart TV that has been connected to the Internet and has transmitted data
27 collectively by our Inscape data services. Our Inscape data services capture real-
28 time viewing behavior data from our VCUs and enable us to provide it to

advertisers and media content providers.” *See*

<http://www.sec.gov/Archives/edgar/data/1648158/000119312515350398/d946612dsla.htm>

6. According to Vizio, approximately 90% of its Smart TV customers made an initial connection of their Smart TVs to the Internet for the twelve month period ended Vizio’s Discovery and Engagement Software, known as VIZIO Internet Apps Plus, connects customers “with traditional and streaming content providers, such as Netflix, Hulu, YouTube and Amazon Instant Video. Since 2009, users have streamed more than 3.5 billion of hours of content through our discovery and engagement software.” *See*

<http://www.sec.gov/Archives/edgar/data/1648158/000119312515350398/d946612dsla.htm>



7. The company’s Inscap data services capture this viewing data in real time. “Inscap provides highly specific viewing behavior data on a massive scale with great accuracy, which can be used to generate intelligent insights for advertisers and media content providers....” The company, according to its October 22, 2015 SEC filing, expects that this will fuel future growth and drive revenue. *See*

<http://www.sec.gov/Archives/edgar/data/1648158/000119312515350398/d946612dsla.htm>

1 8. On information and belief, to further realize its goal of monetizing its VCU
2 television viewers' habits, Vizio acquired full ownership of Cognitive Media
3 Networks, Inc., a software provider based in San Francisco, that enables [Vizio's]
4 Inscape data services.

5 9. On information and belief, Vizio actually knew that data brokers, advertisers,
6 or other partners would combine user identification information transmitted to it--
7 including the user's IP address and other device identification information--with
8 information held by others to identify persons as having requested or obtained
9 specific video materials or services.

10 10. On information and belief, Vizio determines the date, time, channel of
11 programs and whether users watch them live or recorded. The viewing patterns are
12 then connected a user's IP address - the Internet address that can be used to identify
13 every device in a home, from the household TVs to mobile phones. Vizio actually
14 knows that IP addresses can be linked to individuals through data brokers offering
15 "data enrichment," combining additional information about persons tied to a
16 particular IP addresses provided by Vizio.

17 11. On information and belief, Vizio has worked with such data brokers, which
18 may include Tapad, Neustar, and Experian. Tapad helps identify users across their
19 many devices. Vizio's privacy policy concedes that it has begun providing data
20 about customers' viewing habits to companies that "may combine this information
21 with other information about devices associated with that IP address." Vizio
22 actually knows that such data can identify persons by name.

23 12. On information and belief, the company falsely states that it encrypts IP
24 addresses before sharing them; therefore data brokers whose data includes IP
25 addresses tied to names can identify the persons and the prerecorded video cassette
26 tapes or similar audio visual materials watched by those persons merely by having
27 their IP address or other device IDs.

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1 20. Defendant Cognitive Media Networks, Inc., is a Delaware Corporation
2 registered to do business in the State of California. Its principal executive offices
3 are located at 39 Tesla, Irvine, California.

4 21. The true names and capacities of Does 1 through 50 are unknown to
5 Plaintiffs. Plaintiffs are informed and believe and thereon allege that each of these
6 Defendants are in some way liable for the events referred to in this complaint and
7 caused damage to Plaintiffs. Plaintiffs will amend this Complaint and insert the
8 correct names and capacities of those defendants when they are discovered.

9 22. At all times mentioned, each of the Defendants – including Does 1 through
10 50 – was the representative, agent, employee, joint venture, or alter ego of each of
11 the other defendants and in doing the things alleged herein was acting within the
12 scope of its authority as such. Each Defendant is referred to collectively throughout
13 this Complaint as “Vizio”.

14 23. Plaintiff David Watts is a resident of Yolo County, California. He
15 purchased three Vizio Smart TVs at the Target Corporation store located in Davis,
16 California. Model E500i was purchased on May 5, 2014, Model E500i-B1 was
17 purchased on January 20, 2015 and Model E43-C2 was purchased on October 19,
18 2015.

19 24. Plaintiff Whitney Keeter is a resident of Harris County, Texas. She
20 purchased a Vizio Smart TV model E701i-A3 at Costco in Houston, Texas in May
21 or June of 2015.

22 **IV. CLASS ACTION ALLEGATIONS**

23 25. Plaintiffs bring this lawsuit as a class action on their own behalf and on
24 behalf of all other persons similarly situated as members of the proposed Class,
25 pursuant to Federal Rules of Civil Procedure 23(a), (b)(1), and (b)(3). This action
26 satisfies the numerosity, commonality, typicality, adequacy, predominance and
27 superiority requirements of those provisions.

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1 26. The proposed Class is defined as:

2 All persons or entities who purchased one or more Vizio Smart
3 Televisions within the United States, in United States territories, and
4 U.S. service people and citizens who have purchased a Vizio Smart
5 Televisions and who viewed content broadcast over the Internet on the
6 Vizio Smart TV(s) from the four years before the first complaint in
7 this matter is filed through the time of trial.

8 27. Excluded from the Class are Defendants, their affiliates, employees, agents
9 and attorneys, and the Court.

10 28. Plaintiffs reserve the right to amend the Class definitions if discovery and
11 further investigation reveal that any Class should be expanded, divided into
12 additional subclasses, or modified in any other way.

13 **a. Numerosity and Ascertainability**

14 29. The exact number of Class Members is presently unknown. However, the
15 size of the Class can be estimated with reasonable precision. Based upon the
16 Defendants' representations in its SEC-1/A filing that their "products are sold in
17 over 8,000 retail stores throughout the United States and that they held the "#2 unit
18 share position in the US smart, high definition television, or HDTV, industry in
19 2014" and seek to create "a community of over 10 million VIZIO connected units,
20 or VCUs," it is reasonable to presume that the members of the Class are so
21 numerous that joinder of all members is impracticable.

22 30. The disposition of the claims of these Class Members in a single action will
23 provide substantial benefits to all parties and to the Court.

24 **b. Typicality**

25 31. The claims of the representative Plaintiffs are typical of the claims of the
26 Class because, Plaintiffs, like all Class Members, purchased one or more Vizio
27 Smart TVs, connected them to the Internet as intended, and used the TV(s) for their
28 own personal use. Plaintiffs, like all Class Members, have been damaged by

1 Defendants' conduct because they have had their private, identifiable viewing
2 habits and information obtained by Defendants and distributed to third parties
3 without their knowledge or consent. Further, the factual bases of defendants'
4 misconduct are common to all Class Members and represent a common thread of
5 misconduct resulting in injury to all Class Members.

6 **c. Adequate Representation**

7 32. Plaintiffs are members of the Class and will fairly and adequately represent
8 and protect the interests of the Class. Plaintiffs have retained counsel with
9 substantial experience in prosecuting consumer class actions, including actions
10 involving false advertising.

11 33. Plaintiffs and their counsel are committed to vigorously prosecuting this
12 action on behalf of the Class and have the financial resources to do so. Neither
13 Plaintiffs nor their counsel have interests adverse to those of the Class.

14 **d. Numerosity**

15 34. There are numerous questions of law and fact common to Plaintiffs and
16 Class Members that predominate over any question affecting only individual Class
17 Members. The answers to these common questions will advance resolution of the
18 litigation as to all Class Members. These common legal and factual issues include:

- 19 a. whether the Defendants gathered, stored and transmitted the private
20 information about their Vizio Smart TV customers to third parties;
- 21 b. whether Defendants knew or should have known that the private
22 customer information and viewing habits of its Smart TV customers
23 could be easily combined with Internet IP address of each customer
- 24 c. whether Defendants failed to take the steps necessary to ensure that
25 the private, identifiable information of their individual customers
26 was not disclosed to third parties;
- 27 d. whether Defendants made material misrepresentations regarding
28 the collection, storage, distribution, disclosure and utilization of

- 1 their Smart TV customers' personal, identifiable information;
- 2 e. whether Defendants had a duty to disclose the true nature of their
- 3 data collection and dissemination practices to Plaintiffs and Class
- 4 Members;
- 5 f. whether Defendants omitted and failed to disclose material facts
- 6 about their data collection and dissemination;
- 7 g. whether Defendants' concealment of the true nature of the data
- 8 collection, dissemination and utilization induced a reasonable
- 9 consumer to act to their detriment by purchasing one or more Vizio
- 10 Smart TVs; and

11 35. Whether Plaintiffs and Class Members are entitled to injunctive and

12 equitable relief.

13 **e. Superiority**

14 36. Plaintiffs and Class Members have all suffered and will continue to suffer

15 harm and damages as a result of Defendants' unlawful and wrongful conduct. A

16 class action is superior to other available methods for the fair and efficient

17 adjudication of this controversy.

18 37. Absent a class action, most Class Members would likely find the cost of

19 litigating their claims prohibitively high and would therefore have no effective

20 remedy at law. Because of the relatively small size of the individual Class

21 Members' claims, it is likely that only a few Class Members could afford to seek

22 legal redress for Defendants' misconduct. Absent a class action, Class Members

23 will continue to incur damages and Defendants' misconduct will continue without

24 remedy.

25 38. Class action treatment of common questions of law and fact would also be a

26 superior method to multiple individual actions or piecemeal litigation in that class

27 treatment will conserve the resources of the courts and the litigants, and will

28 promote consistency and efficiency of adjudication.

39. Defendants have acted in a uniform manner with respect to the Plaintiffs and Class Members.

40. Class-wide declaratory, equitable, and injunctive relief is appropriate under Rule 23(b)(1) and/or (b)(2) because Defendants have acted on grounds that apply generally to the Class, and inconsistent adjudications with respect to Defendants' liability would establish incompatible standards and substantially impair or impede the ability of Class Members to protect their interests. Class-wide relief assures fair, consistent, and equitable treatment and protection of all Class Members, and uniformity and consistency in Defendants' duties to perform corrective action regarding the Vizio Smart TVs.

V. FIRST CAUSE OF ACTION

Violations of the Video Privacy Protection Act, 18 U.S.C. § 2710

(On Behalf of Plaintiffs and the Class)

41. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

42. Vizio qualifies now and has qualified in the past as a "video tape service provider" under the Video Privacy Protection Act ("VPPA"), because Vizio is "engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." 18 U.S.C. § 2710(a)(4).

43. The VPPA mandates, among other things, that a video tape service provider "shall destroy personally identifiable information as soon as practicable, but no later than on the date the information is no longer necessary for the purpose for which it was collected." 18 U.S.C. § 2710(e).

44. Vizio has violated 18 U.S.C. § 2710(e) because it has failed to destroy its users' personally identifiable information as soon as practicable from the date the information was no longer necessary for the purpose for which it was collected.

45. The VPPA also requires Vizio to keep its customers' personally identifiable information confidential. 18 U.S.C. § 2710(b)(1). "Personally identifiable

1 information” cannot be disclosed to “any person without the informed, written
 2 consent of the consumer given at the time the disclosure is sought.” 18 U.S.C. §
 3 2710(b)(2)(B).

4 46. As owners and users of the Vizio Smart T.V., Plaintiffs’ personally
 5 identifiable information was disclosed for marketing and advertising purposes
 6 without their informed, written consent.

7 47. As a result of Vizio’s conduct described herein and its violation of § 2710,
 8 Plaintiffs and the Class have suffered injuries. Plaintiffs, on their own behalf and on
 9 behalf of the Class, seek an order enjoining Vizio’s conduct described herein and
 10 awarding themselves and the Class the maximum statutory and punitive damages
 11 available under 18 U.S.C. § 2710(c), an award of attorneys’ fees and costs pursuant
 12 to Cal. Code Civ. Proc. § 1021.5, as well as such other and further relief as the
 13 Court deems just and proper.

14 **VI. SECOND CAUSE OF ACTION**

15 **Violations of California’s Customer Records Act, Cal. Civ. Code § 1798.80**

16 **(On Behalf of Plaintiffs and the Class)**

17 48. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

18 49. The California Customer Records Act mandates, among other things, that a
 19 business take all reasonable steps to destroy or arrange for the destruction of a
 20 customer’s records within its custody or control, which contain personal
 21 information that is no longer to be retained by the business. Cal. Civ. Code §
 22 1798.81.

23 50. A business may destroy customer records by erasing the information, or
 24 modifying the personal information in those records to make it unreadable or
 25 undecipherable through any means. Cal. Civ. Code § 1798.81(b), (c).

26 51. Vizio has violated Cal. Civ. Code § 1798.81 by failing to erase or otherwise
 27 destroy its users’ personal information or making their customers’ personal
 28 information unreadable or undecipherable.

52. Pursuant to Cal. Civ. Code § 1798.84, Plaintiffs, on their own behalf and on behalf of the Class, seek an order enjoining Vizio's conduct described herein, an award of attorneys' fees and costs pursuant to Cal. Code Civ. Proc. § 1021.5, as well as such other and further relief as the Court deems just and proper.

VII. THIRD CAUSE OF ACTION

Violation of California's Unfair Competition Law Cal. Bus. & Prof. Code §§ 17200, et seq.

(On Behalf of Plaintiffs and the Class)

53. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

54. California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code 27 §§ 17200, et seq., protects both consumers and competitors by promoting fair competition in commercial markets for goods and services.

55. The UCL prohibits any unlawful, unfair or fraudulent business act or practice. A business practice need only meet one of three criteria to be considered unfair competition. An unlawful business practice is anything that can properly be called a business practice and that at the same time is forbidden by law.

56. Vizio has violated the fraudulent prong of the UCL in that it failed to inform Plaintiffs and the Class that it would indefinitely retain and sell their personally identifiable information and programming viewing histories.

57. Vizio has violated the unfair prong of the UCL in that it continues to profit from selling Plaintiffs' and the Class's personally identifiable information to third parties, without obtaining their consent, in that it is violating the public policies set forth in the VPPA, California Customer Records Act, and the CLRA, as set forth in this Complaint, and in that the utility of the defendants' conduct is outweighed by the gravity of the harm to Plaintiffs and the class.

58. Vizio has violated the unlawful prong of the UCL in that its conduct violated the Video Privacy Protection Act, (18 U.S.C. §§ 2710, et seq.), and the California Customer Records Act, (Cal. Civ. Code § 1798.80), and the CLRA as set forth in

1 this Complaint.

2 59. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiffs, on their own behalf
3 and on behalf of the Class, seek an order enjoining Vizio from continuing to engage
4 in the unfair and unlawful conduct described herein, an award of attorneys' fees and
5 costs pursuant to Cal. Code Civ. Proc. § 1021.5, as well as such other and further
6 relief as the Court deems just and proper.

7 **VIII. FOURTH CAUSE OF ACTION**

8 **Violation of the Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, et seq.**

9 60. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

10 61. This cause of action is brought pursuant to the Consumer Legal Remedies
11 Act, California Civil Code Sections 1750, *et seq.* ("CLRA")

12 62. The CLRA has adopted a comprehensive statutory scheme prohibiting
13 various deceptive practices in connection with the conduct of a business providing
14 goods, property, or services to consumers primarily for personal, family, or
15 household purposes. The self-declared purposes of the Act are to protect
16 consumers against unfair and deceptive practices and to provide efficient and
17 economical procedures to secure such protection.

18 63. Each Defendant is a "person" as defined by Civil Code Section 1761(c),
19 because each Defendant is a corporation as set forth above.

20 64. Plaintiffs and Class Members are "consumers," within the meaning of Civil
21 Code Section 1761(d), because they are individuals who purchased one or more
22 Vizio Smart TVs for personal and/or household use.

23 65. Defendants' Vizio Smart TVs are "goods" within the meaning of California
24 Civil Code Section 1761(a), in that they are tangible products bought by Plaintiffs
25 and Class Members for personal, family, and/or household use.

26 66. Defendants' sale of their products to wholesalers and retailers throughout
27 California constitutes "transaction[s]" which were intended to result or which
28 result[ed] in the sale" of goods to consumers within the meaning of Civil Code

1 Sections 1761(e) and 1770(a).

2 67. Plaintiffs have standing to pursue this claim as they have suffered injury in
3 fact and have lost money as a result of Defendants' actions as set forth herein.
4 Specifically, Plaintiffs purchased Vizio Smart TVs. Had Plaintiffs known that
5 these Smart TVs would be used by Vizio to share information about them,
6 including their viewing habits, their other Internet connected devices, and other
7 personal information with third parties in a manner that enabled disclosure of their
8 identities, in violation privacy laws, they would not have purchased the Vizio Smart
9 TVs.

10 68. Section 1770(a)(5) of the CRLA prohibits anyone from "[r]epresenting that
11 goods or services have sponsorship, approval, characteristics, ingredients, use,
12 benefits, or quantities which they do not have...." Defendants represented that their
13 Smart TVs were for the personal enjoyment of televised entertainment by their
14 customers, when, in fact the Smart TVs were a means whereby Vizio could extract
15 and sell personal information for profit in violation of privacy laws.

16 69. Section 1770(a)(9) of the CLRA prohibits anyone from "[a]dvertising goods
17 or services with intent not to sell them as advertised." Vizio is a multi-million
18 dollar company advised by skilled counsel who, on information and belief, are or
19 by the exercise of reasonable care should be aware of the governing regulations and
20 their purpose, and the necessity to exercise reasonable care to ensure compliance
21 with governing regulations and their purpose. By introducing Vizio Smart TVs into
22 the stream of commerce as a product to be used for the personal, private viewing
23 enjoyment of its customers, and then extracting and selling their personal viewing
24 and other information to third parties for profit notwithstanding this knowledge,
25 Defendants thus intentionally sold misbranded products.

26 70. Plaintiffs have attached hereto the declaration of venue required by Civil
27 Code Section 1780(d).

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PRAYER FOR RELIEF

- A. An order certifying the proposed Class, designating Plaintiffs as the named representatives of the Class, and designating the undersigned as Class Counsel;
- B. A declaration that Defendants are financially responsible for notifying Class members about the true nature of Vizio Smart TVs;
- C. An order enjoining Defendants to desist from further deceptive distribution, marketing and sales of non-compliant Vizio Smart TVs;
- D. An award to Plaintiffs and Class Members of compensatory, exemplary, punitive and statutory penalties and damages, including interest, in an amount to be proven at trial;
- E. An award to Plaintiffs and Class Members for the return of the purchase prices of the Vizio Smart TVs, with interest from the time it was paid for the reimbursement of the reasonable expenses occasioned by the sale, for damages and for reasonable attorneys' fees;
- F. A declaration that Vizio must disgorge, for the benefit of Plaintiffs and Class Members all or part of the ill-gotten profits received from the sale of their personally identifiable information to third parties, and make full restitution to Plaintiffs and Class Members;
- G. An award of attorneys' fees and costs as allowed by law;
- H. An award of pre-judgment and post-judgment interest, as provided by law;

1 I. Leave to amend this Complaint to conform to the evidence produced at
2 trial; and

3 J. Such other relief as may be appropriate under the circumstances.
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5 DATED: January 12, 2016

CUTTER LAW, P.C.

7 /s/ John R. Parker, Jr.

8 By: _____

9 C. BROOKS CUTTER
JOHN R. PARKER, JR.

10 Attorneys for Plaintiffs
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DECLARATION OF JOHN R. PARKER, JR.
PURSUANT TO CALIFORNIA CIVIL CODE § 1780(d)

I, John R. Parker, Jr., declare as follows:

1. I submit this declaration pursuant to section 1780(d) of the California Consumers Legal Remedies Act. I have personal knowledge of the matters set forth below and if called as a witness could and would be competent to testify thereto.

2. Venue is proper in this Court because (1) Defendants' principal place of business is located in this District; (2) many of the acts and transactions giving rise to this action occurred in this District, (3) Defendants are authorized to conduct business in this District and have intentionally availed themselves of the laws and markets of this District through the manufacture, distribution and sale of their products in this District; and (4) are subject to personal jurisdiction in this District.

3. Plaintiff David Watts is a resident of Yolo County, California, and Plaintiff Whitney Keeter is a resident of Harris County, Texas.

4. All of the defendants, including Vizio Holdings, Inc., Vizio, Inc., Vizio Inscape Services, LLC, Vizio Inscape Technologies, LLC, and Cognitive Media Networks Inc., maintain their principal executive offices at 39 Tesla, Irvine, California.

5. This action is commenced in the United States District Court for the Central District of California.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on January 12, 2016, in Sacramento, California.

/s/ John R. Parker, Jr.
John R. Parker, Jr.